UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HELIOS AND MATHESON ANALYTICS, INC. SECURITIES LITIGATION	Case No.: 1:18-cv-6965-JGK CLASS ACTION **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED CLASS ACTION COMPLAINT**

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I. INTRODUCTION. [1]

Plaintiffs' Amended Class Action Complaint (the "Amended Complaint" or "AC") fails to plead adequately three essential elements of a Section 10(b) claim, namely (i) the existence of a false or misleading statement or omission, (ii) scienter, and (iii) loss causation.[2]

False or Misleading Statement or Omission: The Amended Complaint's attempt to plead an actionable false statement or omission is actually rather shocking due to its failure to acknowledge the contents of an October 11, 2017 Form 8-K (the "October 2017 8-K" or in context "8-K"), which was filed near the start of the class period and is filled with risk factor disclosures that go right to the heart of Plaintiffs' case. Ex. A at 4-7.

The class period begins with the announcement by Defendant Helios & Matheson Analytics, Inc.'s ("Helios" or the "Company") on August 17, 2017 of its agreement to buy a majority stake in privately-held MoviePass Inc. ("MoviePass"). Helios is a public company that "provid[es] 'high quality information technology, or IT, services and solutions . . . focusing on big data, business intelligence, and consumer-centric technology.'" ¶ 25. MoviePass is a subscription service that entitles MoviePass subscribers to see movies in theaters nationwide for a fixed monthly or annual fee. ¶ 1.

In connection with the MoviePass acquisition, Helios filed the October 2017 8-K, which identified the principal risks that the AC claims went undisclosed—such as the fact that MoviePass was a money-losing new business that expected to receive a "going concern" opinion from its

[1] All "¶" citations refer to the Amended Complaint. All exhibit citations refer to the concurrently filed Request for Judicial Notice. Throughout this brief, all emphases are added (unless otherwise noted), and internal citations from quoted cases are omitted.

[2] In a Section 10(b) case, the basic elements are: 1) a material misrepresentation (or omission); 2) scienter, i.e., a wrongful state of mind; 3) a connection with the purchase or sale of a security; 4) reliance; 5) economic loss; and 6) loss causation, i.e., a causal connection between the material misrepresentation and the loss. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

auditors; that Helios lacked sufficient funds to finance MoviePass' operations and intended to tap the capital markets to support its MoviePass investment; and that shareholder dilution could be "significant." Ex. A at 5. As a result of MoviePass' growing subscriber base, Helios and MoviePass hoped that movie theater chains would share with MoviePass their increased ticket and concessions revenue, and that the data gathered by the MoviePass app could be monetized to sell digital advertising and data analytics services to the movie studios and distributors. *Id.* at 4. But the October 2017 8-K also said that these were aspirational goals, and it warned potential investors that there were as yet *no contracts* with major theater chains or movie studios, that theater chains might be reluctant to share their revenue, that there could be competition from established industry players, and that Helios might not be able to monetize the data collected by the MoviePass app. *Id.* at 4-7.

In short, the October 2017 8-K addressed each of the major issues that Plaintiffs contend were misrepresented or omitted. Yet in their 100-page Amended Complaint, Plaintiffs quoted only tiny snippets from the October 2017 8-K. *See* ¶¶ 59.[3] What makes this all the more shocking is that the AC references the press release attached to this 8-K as one of its supposedly misleading statements (Statement 6, ¶¶ 118-19), but except for the short passage mentioned, fails to address any of the comprehensive risk factors discussed in the 8-K.

A key reason for passage of the Private Securities Litigation Reform Act (the "Reform Act" or "PSLRA"), 15 U.S.C. 78u-4 & 5 (2012), was Congress' intention to encourage and protect

[3] Paragraph 59 of the AC reads as follows: "Helios admitted that its business plan was bound to generate losses at first, stating that 'MoviePass currently spends more to retain a subscriber than the revenue derived from that subscriber and MoviePass does not have other sources of revenue. This results in a negative gross profit margin.'" While Plaintiffs do not cite the source of this quote, it plainly comes from the third paragraph of the October 2017 8-K under the heading, "**MoviePass has a limited operating history and history of net losses, and it is likely that it will experience net losses for the foreseeable future**." Ex. A at 4 (emphasis in original).

forward-looking statements in order to "make more information about a company's future plans available to investors and the public." Conference Report No. 104-369, U.S.C.C.A.N at 744. Here, the risk factor disclosures that accompanied the MoviePass acquisition could not have been more complete. That Plaintiffs found it necessary to essentially ignore the October 2017 8-K is a testament to its power. *See City of Taylor Gen. Emples. Ret. Sys. v. Magna Int'l, Inc.*, 967 F. Supp. 2d 771, 792 (S.D.N.Y. 2013) (once allegations were "stripped of their verbiage and ellipses," it was clear that "defendants made a cascade of disclosures concerning (1) the existence and nature of the operational inefficiencies and (2) the Company's outlook and progress in addressing those problems . . . . [I]t is hard to fathom precisely what more information defendants could have disclosed to render their statements not misleading.").

Scienter: The Amended Complaint takes a kitchen-sink approach to pleading scienter that comes nowhere close to satisfying the statutory standard that a plaintiff "state with particularity *facts* giving rise to a *strong inference* that the defendant acted with the required state of mind" for "*each* act or omission alleged to violate" Section 10(b). 15 U.S.C. § 78u-4(b)(2). The Supreme Court has interpreted this "strong inference" pleading standard as requiring that the "inference of scienter must be more than merely 'reasonable' or 'permissible'—it must be *cogent and compelling*, and thus strong in light of other explanations." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 324 (2007).

Instead of pleading particularized facts, Plaintiffs just throw stuff against the wall in the hope that some of it will stick, but this scattershot approach which references some seven different items—none of which satisfy Second Circuit pleading standards—only detracts from their pleading a cogent and compelling case.

Loss Causation: There is no adequate pleading of loss causation. Rather than the classic scenario featuring a dramatic price drop following the supposed revelation of the "truth," this case features a gradual withdrawal of air from the balloon over the course of months. According to Plaintiffs, the "truth emerged" on July 27, 2018, when Helios filed a Form 8-K stating that it had issued a $6.2-million demand note in order to access money to pay its merchant and fulfillment processors and resolve a service interruption, following which the stock dropped by $4.83/share. ¶¶ 143-44. But Helios' stock had been flagging for months prior to that 8-K, and the AC itself points out that during the two days preceding that announcement, Helios' stock declined by $15.67 per share, or more than triple the decline that occurred after Plaintiffs claim the truth emerged. ¶¶ 142, 144-45.

Prior to July 27, 2018, Helios' stock price had already lost 99.92% of its value measured from its class period high.[4] Ex. Q & R. These circumstances do not satisfy *Dura*'s requirement that the price decline follow the revelation of a fraud. *Dura,* 544 U.S. at 346; *see Ventura v. Merrill Lynch & Co*., 568 F. Supp. 2d 349, 364 (S.D.N.Y. 2008) (where price dropped nearly 80% before alleged corrective disclosure, complaint did not "explain how the decline of the stock price following [the corrective disclosure] was attributable to the alleged fraud, rather than simply a continuation of the loss in value.").

II. FACTUAL BACKGROUND.

Helios is described as a company "suffering from significant financial troubles" (¶ 1), "performing poorly" with net losses of $7 million in 2016, and facing Nasdaq delisting *prior to* the MoviePass acquisition (¶ 38). MoviePass is described in the October 2017 8-K as having "incurred ***losses since inception*** and [having] a ***present need for additional funding***," and as

[4] This decline is measured from the class period high of $8,225 on October 11, 2017 to the closing price of $6.83 on July 26, 2018 (adjusting for a reverse stock split).

expecting to "receive a qualification on its audited financial statements for [the 2015 and 2016] fiscal years . . . expressing ***substantial doubt*** about its ability to continue as a ***going concern***." Ex. A at 4.

On August 15, 2017, Helios agreed to acquire a majority interest in MoviePass which marks the beginning of the class period. On that same date, MoviePass introduced a new pricing model of $9.95/month for virtually unlimited viewing at participating theaters. ¶ 53. The AC describes the "unprecedented growth" this pricing model brought about. ¶ 67. Under the acquisition transaction documents between Helios and MoviePass referenced in the AC, MoviePass could earn a "subscriber milestone" payment from Helios if MoviePass exceeded 150,000 subscribers in *15 months*. As it turned out, MoviePass achieved this in *two days.* ¶ 54. By October 2017, MoviePass had over 600,000 monthly subscribers (¶ 122), and "within four months . . . MoviePass had over 1 million total paying subscribers" (¶ 57). Plaintiffs "put [these numbers] into perspective" by comparing MoviePass to "other subscription-based services such as Spotify, Hulu, ClassPass, and Netflix [which achieved] 1 million subscribers in 5, 10, 17, and 39 months respectively." *Id.* "By January 2018 MoviePass had surpassed 1.5 million paying subscribers, and by February 2018 these numbers had surpassed 2 million." *Id.* Clearly, the new concept Helios announced resonated with the public.

Where MoviePass fits within the spectrum of business models time will tell. Many businesses lose substantial amounts of money at first (e.g., Amazon, Netflix, Uber) only to become considered among the world's most valuable companies. Deciding the best business strategy is not the province of the securities laws: disclosure is, and the disclosures here were robust, starting with those in the October 2017 8-K that Plaintiffs barely can bring themselves to mention.

III. LEGAL ARGUMENT.

A. The Amended Complaint Fails To Plead An Actionable False And Misleading Statement Or Omission.

1. The October 2017 8-K Addresses Virtually All Of The False and Misleading Statements Alleged In The Complaint.

There is a core set of allegations that Plaintiffs level at Defendants for each of the 16 statements referenced in the Amended Complaint. These allegations are often contradicted by the October 2017 8-K, and other parts of the quoted statements that Plaintiffs ignore.

For example, paragraph 50 of the AC says, "Defendants represented that they *would be able* to obtain agreements with theaters and restaurants to receive a cut of their sales as a result of this increased business." ¶ 50. But Helios' October 2017 8-K says exactly the opposite:

> "MoviePass *may not gain* acceptance from large national exhibitors (movie theater chains), . . . MoviePass *has not historically received a benefit from* ***any*** *large national exhibitors* for driving MoviePass subscribers to their theaters (for example, in the form of a portion of concession sales) . . . . [I]f MoviePass is unable to partner with large national exhibitors, ... MoviePass likely will continue to be required to pay full price per movie ticket . . . . [and] would be unlikely to share in concession sales to its subscribers . . . and MoviePass may not be able to sell digital advertising or data analytics services to those large national exhibitors. If MoviePass is unable to negotiate discounted ticket prices from, share in concession sales with or sell digital advertising or data analytics services to large national exhibitors, . . . MoviePass *may not be able to sustain its operations*."

Ex. A at 4-5.

Plaintiffs also allege that Defendants "falsely claimed that Helios *could and* ***would be*** *profitable* under its $9.95/month per subscriber model due to access from 'additional revenue

sources' and its data mining capabilities[.]" ¶ 116. (Before moving to what the 2017 Form 8-K says, it should be noted that the actual quote from Helios' CEO in ¶ 116 is, "So ***we think*** *we* ***can be*** *profitable* on the subscriptions at $9.95 and then make real money from the additional revenue sources." *Id.*) But Helios' 8-K cautioned that the $9.95/month plan could lead to "increased movie viewing by subscribers . . . result[ing] in significant and increasing losses per subscriber, negative cash flow and could impair the ability of MoviePass to operate as a going concern absent additional sources of revenue or financing." Ex. A at 4. It also said MoviePass had a "history of net losses, and that it was ***likely that it will experience net losses for the foreseeable future***," and that its success would depend upon "securing additional sources of revenue," the absence of which "could lead to the loss of Helios' investment in MoviePass." *Id.* It also said that "MoviePass currently *spends more to retain a subscriber than the revenue derived* from that subscriber and MoviePass currently ***does not have other sources of revenue.*** This results in a negative gross profit margin. MoviePass ***expects its negative gross profit margin to remain significant*** until MoviePass can generate other sources of revenue to offset the losses . . . [and] there is ***no assurance MoviePass will be able to generate other sources of revenue*** . . . ." *Id.*

Finally, the AC contains various allegations along the lines that Helios falsely stated or implied in its 8-K that Helios had adequate capital on hand to fund MoviePass, and that shareholders were misled as to potential dilution. *See, e.g.,* ¶¶ 3 ("no concern"), 62 ("no need to worry"). What the 8-K actually says is that MoviePass had "incurred losses since inception and has a present need for additional funding"; "*will continue to need additional capital*"; had "funded its operating losses and capital expenditures through proceeds from private equity and debt financings"; and faced a "***present need for significant additional financing,*** [which] may continue ***for the foreseeable future***" which could result in "***dilution, perhaps to a significant extent.***" Ex.

A at 5. Defendants' class period statements were consistent with this disclosure. Among the alleged false statements is a *Variety* interview by Lowe (CEO of MoviePass) who said on August 17, 2017—near the start of the class period—"We know *we're going to have to raise money* over time if we're going to grow this to millions and millions of subscribers" (¶ 110), and Farnsworth (Helios' CEO) who answered his own rhetorical question in an October 13, 2017 interview with Marketwatch.com: "'*Will we need to raise more capital for the future? Sure*'" (¶ 120). These statements about the anticipated need for additional funding, particularly when combined with the Company's resort to the capital markets referenced in ¶¶ 197-224, cannot have misled an efficient market about Helios' anticipated and ongoing need for capital. *See City of Taylor*, 967 F. Supp. 2d at 796 (complaint's own allegations showed that defendants "warned investors that . . . problems would take a number of years to resolve").

To these core allegations (i.e., supposed guarantees about lucrative deals, assurances of profitability at $9.95/month, and no potential dilution), Plaintiffs add three other things. The first is that Helios allegedly lacked data analytics capability, with the AC stating that "there is not a scintilla of evidence that Helios had the knowledge, tools, or capabilities to do what Defendants claimed." ¶ 66. Plaintiffs not only are improperly attempting to shift their pleading burden to Defendants, but this Circuit has long recognized that corporate defendants have no obligation to disparage themselves. *See, e.g., In re Ultrafem Inc. Sec. Litig.*, 91 F. Supp. 2d 678, 699 (S.D.N.Y. 2000) ("A company has no duty to disparage its own competitive position in the market . . . .").

The second is that "Defendants knew Helios had no chance of succeeding" (¶ 6) and knew that the $9.95/month model was "guaranteed to cost hundreds of millions of dollars without a chance for a profit" (¶¶ 2, 48), which raises the obvious question, if you knew that, why even try? There is no allegation in this case of a "bail-out" by insiders, as there's no allegation of even a

single share of stock being sold by the individual defendants. And the proposition that this business model had no chance of success is undermined by the AC's allegations that the major theater chains were starting to offer their own subscription services. ¶¶ 80-82. While Defendants strongly disagree with Plaintiffs' premise, even if true it would fail to state a claim pursuant to *Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977) (Congress did not intend "to bring within the scope of § 10(b) instances of corporate mismanagement").

The third is that MoviePass lacked the capacity to execute on its $9.95/month plan which is based on the commentary of CW 1, who worked as a "Customer Experience Representative" from October 2017 to March 2018." ¶ 68. Other than minor quibbles,[5] there is nothing about CW 1's statements with which Defendants fundamentally disagree. CW 1 came on board shortly after the $9.95/month offer was launched and reports feeling overwhelmed with a "'huge' backlog of customer inquiries . . . which made it difficult for MoviePass' customer service department to respond in a timely manner." ¶ 70. That feeling was true Company-wide as the popularity of the $9.95 offer vastly exceeded expectations. What is more important is what CW 1 does not say. There is no suggestion that MoviePass was not trying to deal with customers honestly and fairly, and in fact CW 1 reports considerable progress during her five months with MoviePass, with wait times dropping from two months when she started, to 10-14 days when she left. ¶ 71. CW 1 is also the source of the AC's frequent references to "phantom accounts," which are made to sound nefarious in their retelling, but which as described by CW 1 innocently refers to *customers* "*accidentally* open[ing] multiple accounts," by "hit[ting] the 'submit' button more than once," or opening nonconforming email accounts. ¶ 75.

[5] For example, MoviePass would not agree that it was "'cavalier' . . . and assigned no 'urgency' to refunds." ¶ 76.

The Amended Complaint adopts the oft-criticized "puzzle pleading" style by bolding/italicizing certain portions of the 16 public statements alleged, and saying they were false by virtue of some combination of the six reasons set forth above. *See* ¶¶ 6, 106, 109, 111, 113, 115, 119, 121, 123, 125, 127, 129, 132, 134, 137, 139, 141. Many cases have criticized this style as unfair to both defendants and the Court. *See In re Splash Tech. Holdings Sec. Litig.,* 160 F. Supp. 2d 1059, 1073 (N.D. Cal 2001) ("The fact that certain sections … have been highlighted is not a reliable guide to determining which statements are alleged to be false."); *In re Calpine Corp. Sec. Litig.,* 288 F. Supp. 2d 1054, 1089 (N.D. Cal. 2003) ("Plaintiffs seem to believe that by throwing as many allegations at the Court and defendants as possible, one will somehow slip by the Court and 'stick.' This practice is utterly unacceptable, and . . . has wasted the Court's time.").

2. The Alleged False Statements Are Forward Looking Statements Protected By The Statutory Safe Harbor.

The Reform Act's safe harbor provisions were "designed to encourage company disclosure of future plans and objectives by removing the threat of liability." *Helwig v. Vencor, Inc*., 251 F.3d 540, 559 (6th Cir. 2001). The Reform Act's protections are especially important to fast-growing technology companies like MoviePass, which aspire to "completely disrupt[ ] the movie industry in the same way that Netflix and Redbox have done in years past." ¶ 108. In its October 2017 Form 8-K, Helios warned that MoviePass was in an "early stage of development" and success would require "attract[ing] a large number of subscribers who have traditionally used online and pay cable channels, such as Netflix, HBO and Showtime, and pay-per-view and video-on-demand as opposed to attending movie theaters." Ex. A at 7.

Most of the statements at issue were made in press releases that included standard safe-harbor warnings, including that the forward-looking statements contained therein were "based on a number of assumptions" and "current expectations and are necessarily subject to associated

risks." *E.g.*, Ex. B, C, D. Early in the class period, the October 2017 8-K provided the comprehensive risk factors disclosures discussed above, and subsequent press releases (besides having their own safe harbor language) made express reference back to the October 2017 8-K. *E.g.*, Ex. H & K. Later in the class period, on April 17, 2018, Helios issued its 2017 Form 10-K which is also alleged to be false (Statement 12, ¶¶ 130-32). That 10-K repeated the risk factor disclosures in the October 2017 8-K using slightly revised language. Ex. M. SEC filings made express reference back to the risk factors discussed in the 2017 10-K and the October 2017 8-K. *E.g.*, Ex. O. Between the October 2017 8-K, and the 2017 10-K, came the Form 10-Q for the third quarter of 2017 (filed November 14, 2017), which repeated the risk factor disclosures described in the 8-K. Ex. I. (Plaintiffs do not take issue with any statement made in that 10-Q.)

Helios has "two distinct entrances" to the Reform Act's safe harbor. *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 491 (3d Cir. 2016). Assuming a forward-looking statement is material, the Reform Act's grant of "immunity applies if *either* the 'forward-looking statement is . . . [1] identified as [such], and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement' *or* [2] the plaintiff fails to prove the forward-looking statement 'was made with actual knowledge by [the speaker] that the statement was false or misleading . . . .'" *Id.* at 490 (quoting 15 U.S.C. § 78u-5(c)(1)).

"To determine whether cautionary language is meaningful, courts must first identify the allegedly undisclosed risk and then read the allegedly fraudulent materials—including the cautionary language—to determine if a reasonable investor could have been misled into thinking that the risk that materialized and resulted in his loss did not actually exist." *In re Delcath Sys., Inc. Sec. Litig.*, 36 F. Supp. 3d 320, 333 (S.D.N.Y. 2014). The risk factors discussed in the October

2017 8-K, the November 2017 10-Q, and the 2017 Form 10-K were extraordinarily on point in describing the risks that the AC alleges came to pass, but even if that were not the case the statutory safe harbor would still be available. *See Slayton v. Am. Express Co.*, 604 F.3d 758 at 773 (2d Cir. 2010) ("a defendant need not include the particular factor that ultimately causes its projection not to come true in order to be protected by the meaningful cautionary language prong of the safe harbor").[6] In determining whether meaningful cautionary statements were used, the court's analysis is objective. *Id*.

By any objective measure, by virtue of the extensive risk factors discussed above, the forward-looking statements made in the 16 allegedly actionable statements set forth in the AC should gain the benefit of the first prong of the statutory safe harbor. *See In re Supercom Inc. Sec. Litig.*, 2018 U.S. Dist. LEXIS 175467, at *58 (S.D.N.Y. Oct. 10, 2018) (granting motion to dismiss where statements were "not actionable because they are inseparable from the forward-looking projections" and "were accompanied by meaningful cautionary language"). And because the AC is based exclusively on the alleged falsity of the forward-looking statements—there is not an objective fact that is anywhere alleged to be false—the statutory safe harbor provides Defendants with a complete defense.

As to the second prong, even in the absence of meaningful cautionary language, the safe harbor is available to a defendant if "the plaintiff fails to show the statement was made with actual knowledge of its falsehood." *OFI*, 834 F.3d at 491. "[B]ecause the safe harbor specifies an 'actual knowledge' standard for forward-looking statements, the scienter requirement for forward-looking statements is stricter than for statements of current fact. Whereas liability for the latter requires a

[6] *See also MGT Capital Invs., Inc. Sec. Litig.*, 2018 U.S. Dist. LEXIS 32940, at *11 (S.D.N.Y. Feb. 27, 2018) ("when defendants warn investors of a potential risk, they need not predict the precise manner in which [the] risks will manifest themselves").

showing of either knowing falsity or recklessness, liability for the former attaches only upon proof of knowing falsity." *Slayton*, 604 F.3d at 773. There is nothing alleged in the AC which demonstrates "actual knowledge" of falsity on behalf of any of the Defendants.

3. The Alleged False Statements Constitute Non-Actionable Opinions Or Puffery.

The statements alleged in the AC are also non-actionable because they are opinion statements that are not susceptible to truth or falsity. "[A] statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not." *Omnicare, Inc. v. Laborers Dist. Council Constr. Pension Fund*, 135 S. Ct. 1318, 1325 (2015). If a defendant begins a statement with "I believe," a "plaintiff could later prove that opinion erroneous, [but] the words 'I believe' themselves admitted that possibility, thus precluding liability for an untrue statement of fact." *Id.* at 1326. The fact that a defendant held an incorrect opinion is not "an invitation to Monday morning quarterback an issuer's opinion." *Id*. at 1327. Because executives are entitled to hold opinions, even erroneous ones, an opinion statement is not actionable even "when an issuer knows, but fails to disclose, some fact cutting the other way." *Id.* at 1329.

The statements set forth in the AC reflect Helios and MoviePass executives' opinions, hopes, and thoughts, and are prefaced with expressions such as "we hope," "we believe," "we think," or "should." For example:

August 15, 2017 Press Release (Statement 1)

- "Today's acquisition by Helios & Matheson is a huge step towards making our vision a reality . . . ." (¶ 108);
- "I believe the technology platforms that Helios and Matheson has built over the years are a perfect fit for the MoviePass family." (¶ 108);

September 14, 2017 Press Release (Statement 4)

- "Helios and Matheson believes its technology stack combined with the MoviePass business model will transform the movie going experience and create great value for both companies." (¶ 114);
- "MoviePass is bridging that gap [in consumer data analysis], which should prove to be of tremendous value to production studios." (¶ 114);

October 24, 2017 Press Release — (Statement 8)

- "We believe our strategy is paying off in terms of increased satisfaction, reduced churn, and faster growth . . . . I believe our ongoing investments in customer experience, usability and convenience have steadily improved customer satisfaction and retention." (¶ 122);
- " . . . HMNY believes that MoviePass can bridge an intelligence gap for the movie theater industry . . . ." (¶ 122);
- "Together, I believe HMNY and MoviePass can offer important analytics to movie studios and exhibitors while serving the interests of moviegoers in the process." (¶ 122);

2017 Form 10-K (filed April 17, 2018) (Statement 12)

- "MoviePass believes it is in a position to increase theater attendance, increase concession sales and drive subscribers to consume movie content in the theaters rather than at home." (¶ 131);
- "MoviePass believes that the simplicity of the process and the ability to engage with consumers through the various steps of the check-in process through the app creates an opportunity to drive consumers to theaters more often and for select films." (¶ 131);

April 18, 2018 Prospectus Supplement (Statement 14)

- "The Company intends to strengthen our management team and combine its data and artificial intelligence technology with MoviePass' technology." (¶ 135);

- "[W]e believe we will be able to bring a significant technological advantage to MoviePass." (¶ 135);

Form 10-Q (filed May 15, 2018) (Statement 15)

- "By the end of April 2018, we implemented certain measures to promote the fair use of our MoviePass subscription product, which we believe should improve our cash flow significantly." (¶ 138).[7]

Similarly, it is well-settled that "expressions of puffery and corporate optimism do not give rise to securities violations. *See In re QLT Inc. Sec. Litig*., 312 F. Supp. 2d 526, 532 (S.D.N.Y. 004) ("The PSLRA deems generalized expressions of corporate optimism immaterial as a matter of law and therefore insufficient as the basis for an action alleging securities fraud."). "Although there is no definitive test to determine how vague a statement must be to qualify as puffery, statements expressing a general view that 'things are going well,' that the company is 'well positioned,' or that a year was 'successful' are generally not actionable." *Supercom*, 2018 U.S. Dist. LEXIS 175467 at *65-66; *see also Vivendi S.A. Sec. Litig.,* 838 F.3d 223 at 245 (2d Cir. 2016) ("Puffery encompasses statements that are too general to cause a reasonable investor to rely upon them, and thus cannot have misled a reasonable investor. They are statements that lack the sort of definitive positive projections that might require later correction.").

[7] This is a partial list. Other referenced statements include similar statements of opinion, corporate optimism, and forward-looking aspirations. *E.g.*, *September 25, 2017 Schedule 14A (Statement 5)*: "But I think we're going to bring a lot of business to the cinema operators." (¶ 116); *October 11, 2017 Press Release (Statement 6):* "[W]ith further investment … we believe we can scale even further." (¶ 118); *December 14, 2017 and February 14, 2018 Prospectus Supplements (Statements 9-10):* "[W]e believe we will be able to bring a significant technological advantage to MoviePass." (¶¶ 124, 126); *March 23, 2018 Press Release (Statement 11):* "We believe our business will succeed by granting the public greater access to see movies how they were originally intended to be seen—in theaters." (¶ 128); *June 28, 2018 Reddit "Ask Me Anything" Commentary (Statement 16)*: "In the future, our path to profit will be by selling ads, engaging in brand partnerships and creating our own content." (¶ 140).

Defendants are entitled to express belief in their corporate mission and the merit of their products or services without running afoul of the securities laws. *See Gen. Partner Glenn Tongue v. Sanofi*, 816 F.3d 199, 211 (2d Cir. 2016) (optimistic statements that FDA was likely to approve new drug were not misleading, even when company failed to disclose some negative guidance from FDA).

4. The Alleged False or Misleading Statements Are Thinly Veiled Mismanagement Claims.

Much of the Amended Complaint sounds in alleged mismanagement such as "Defendants knew [their] business model would never be profitable" (¶ 3), that the changes implemented by Helios to the $9.95/month subscription model "were guaranteed to cost hundreds of millions of dollars without a chance for profit" (¶¶ 2, 48), and "Defendants knew they did not have the money, knowledge, or capabilities to execute a successful plan" (¶ 52). These are classic allegations of non-actionable corporate mismanagement under *Santa Fe*. *See In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 376 (S.D.N.Y. 2004) ("allegations of garden-variety mismanagement are not actionable under Section 10(b)"); *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 563, 574 (S.D.N.Y. 2014) (rejecting claims based upon "grossly deficient quality controls" because "[a]llegations of corporate mismanagement . . . are not actionable"), *aff'd*, 604 F. App'x 62 (2d Cir. 2015).

B. <u>Plaintiffs Fail To Plead "Cogent And Compelling" Facts Establishing A "Strong Inference" Of Scienter.</u>

Tellabs mandates that Plaintiffs state, with particularity, "cogent and compelling" facts giving rise to a "strong inference" that Helios acted with an intent to mislead investors. Under *Tellabs*, "in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences." *Tellabs*, 551 U.S. at 322-23. Pursuant

to this analysis, a "complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 324; *see also Slayton*, 604 F.3d at 775 (scienter requirement not met where "the plaintiffs have not alleged any theory as to why the defendants would knowingly mislead investors").

Lacking a core theory of fraud that they could build a series of cogent and compelling facts around, Plaintiffs point to a hodgepodge of different things, none of which is cogent and compelling in its own right, and which are even less so when viewed holistically.

1. Executive Compensation.

Plaintiffs complain about supposedly "exorbitant compensation packages" primarily featuring conditional "stock awards" (¶¶ 186-94), before eventually getting around to acknowledging that those stock awards were in fact "not approved" (¶ 195) because they were never submitted to the stockholders. Regardless, courts do not infer scienter based on compensation alone. *See S. Cherry St., LLC v. Hennessee Grp. LLC,* 573 F.3d 98, 109 (2d Cir. 2009) (scienter not established by alleging "the desire to maintain a high stock price in order to increase executive compensation"); *Geiger v. Solomon-Page Grp.*, 933 F. Supp. 1180, 1190 (S.D.N.Y. 1996) ("officers and directors typically have part of their compensation linked to the price of the company's shares and will naturally have an interest in a high stock price based on this link").

The Second Circuit focuses upon the percentage and timing of stock *sold* during the class period. *See City of Taylor*, 967 F. Supp. 2d at 798 (insider trading would only give rise to a strong inference of scienter if it is "dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information"). ***There is no allegation in the AC that any individual defendant sold even a single share of stock during the class period.***

2. Class Period Financings.

The AC describes a series of financings in August 2017 (¶¶197-202), November 2017 (¶ 203-07), April 2018 (¶ 217-24), and January 2018 (¶ 208-10) which it characterizes as Defendants "desperately engaging in a series of dilutive stock sales in order to cover their massive losses and create a façade of success." ¶ 7. But there is no allegation that the financial statements issued during the class period were false, and thus it is hard to understand how an efficient market could have been duped by a "façade of success." "Multiple courts have rejected the invitation to infer scienter on the basis of a generic desire to raise capital, even much-need[ed] capital" because "the desire to raise capital is amongst the broadest, most generalized, and most commonplace motives of corporate motivation for any action." *Brecher v. Citigroup Inc.*, 797 F. Supp. 2d 354, 370 (S.D.N.Y. 2011).

3. Stock as Currency.

Plaintiffs allege that Defendants were motivated to commit fraud in order to use "stock as currency" in compensating Helios' financial advisor, and in making a small acquisition near the end of the class period. ¶¶ 211-16, 225-27. But most of the payments to the financial advisor alleged in the AC were *pre-class period* transactions (¶¶ 212-14), and all involved warrants (now underwater) as just one component of compensation (¶¶ 212-16).

The small acquisition mentioned at the end of Plaintiffs' scienter section involved MoviePass acquiring the exclusive rights to the "Moviefone" brand, and it occurred *after* Helios' stock had already declined to $2.98/share (¶ 226), which was *lower* than the post-"truth revealed" price of $4.83/share (¶ 233). This would represent a particularly bad execution of fraudulent intent to use stock as currency because the traditional concept of "stock as currency" involves major acquisitions at an inflated, not a deflated price. *See In re Complete Mgmt. Sec. Litig.*, 153 F. Supp.

2d 314, 328-29 (S.D.N.Y. 2001) (where plaintiffs alleged stock as currency, "the artificial *inflation* of stock price in the acquisition context may be sufficient for . . . scienter").

4. Customer Service Issues.

Plaintiffs contend that scienter is established by the fact that Defendants "knew or recklessly disregarded that MoviePass lacked the technology, capability, and knowledge to handle the massive increase in subscriptions that would result from slashing the monthly price of MoviePass subscriptions to $9.95 per month" basing this upon the statements made by CW 1. ¶ 167. But as the AC points out, consumer demand for this service vastly exceeded expectations (¶¶ 54, 57), and CW 1 reports that customer service issues were improving by the time she left the Company (¶ 71). Absent anything more, these types of allegations fail to plead a cogent and compelling case. *See Footbridge Ltd. Trust v. Countrywide Home Loans, Inc.*, 2010 U.S. Dist. LEXIS 102134, at *45 (S.D.N.Y. Sept. 28, 2010) ("broad allegations of poor customer service . . . [were] not supported by particularized facts and [were] insufficient to support a fraud claim").

5. Director Resignation.

Plaintiffs depict the resignation of Carl Schramm, one of Helios' directors, as evidencing a "strong inference" of scienter (¶¶ 10, 101), but they have "not come close to connecting [that] resignation[ ] to the fraud alleged in this case." *Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 599 (S.D.N.Y. 2011). The fact that one director left the Company does not cause any inference of scienter, let alone a "cogent and compelling" one.[8] *Id.*

[8] Plaintiffs also erroneously allege that the resignation of two *MoviePass* Board members—Christopher Kelley and Maria Stipp—evidence scienter on the part of Helios (¶¶ 12, 103), but resignations of board members of an acquired Company can hardly be considered suspicious.

6. Pending Investigation.

Plaintiffs refer to an investigation by the New York Attorney General's office (¶¶ 102, 174-76) as supportive of a cogent and compelling inference of scienter, but government investigations in and of themselves are insufficient to raise this inference. *See Lipow v. Net 1 UEPS Techs., Inc.*, 131 F. Supp. 3d 144, 167 (S.D.N.Y. 2015) ("government investigations cannot bolster allegations of scienter that do not exist, and, as currently plead, the government investigations are just that, investigations"); *In re Manulife Fin. Corp. Secs. Litig.*, 276 F.R.D. 87, 102 (S.D.N.Y. 2011) (securities investigation did "not itself constitute a strong inference of scienter" because "[s]ecurities regulators are obligated to examine the behavior of public corporations, and the fact that a regulator is fulfilling this role cannot be sufficient to allege scienter").

7. **Ad *Hominem* Attacks Against Helios' Former Majority Shareholder And Its Current CEO.**

Finally, Plaintiffs resort to a series of *ad hominem* attacks. *E.g.*, ¶¶ 180-85. Thus, we are informed that Helios' former majority shareholder had legal issues in India, the results of which are not stated (¶¶ 36-37, 39, 180); that Helios' CEO registered "over 50 different companies with the state of Florida" (¶¶ 97, 180) and that since 2010 he or "his affiliated companies have been sued at least 8 times" (¶¶ 98, 180); and that *months after the end* of the class period, some people in MoviePass human resources were fired, and another person sent a "'scathing' letter about a 'toxic work environment'" (¶ 104). There is no attempt to tie any of these to anything of relevance in this securities fraud case, and the need to stoop to this level only detracts from Plaintiffs' case. Whether measured individually or holistically, this smorgasbord does not satisfy the *Tellabs* "cogent and compelling" pleading standard.

C. Plaintiffs Fail To Adequately Plead Loss Causation.

"Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Vivendi*, 838 F.3d at 260. To "establish loss causation, a plaintiff must show that the loss was a foreseeable result of the defendant's conduct (*i.e.*, the fraud), *and* that the loss was caused by the materialization of the . . . risk concealed by the defendant's alleged fraud." *Id.* at 261 (emphasis in original). Plaintiffs' theory of loss causation is based upon Helios' stock price dropping by $4.83 per share after Helios filed the July 2018 8-K which revealed the issuance of the demand note, but Plaintiffs also pled that during the two days preceding that announcement, Helios' stock declined by $15.67 per share, or more than triple the decline that occurred the day after Plaintiffs claim the truth emerged. ¶¶ 142, 144-45.

Moreover, from the judicially noticeable stock price chart (Ex. Q), the Court can see that Helios' stock lost more than two-thirds of its value during the first five months of 2018, and that by the time Plaintiffs say the truth was revealed, it had lost 99.92% from its class period high on October 13, 2017 (Ex. R). That makes this case much like *Ventura* where a stock price drop of nearly 80% preceded the supposed corrective disclosure, and plaintiffs could not explain how their situation described anything more than "simply a continuation of the loss in value." 568 F. Supp. 2d at 364.[9]

[9] *See also 60223 Trust v. Goldman Sachs & Co.*, 540 F. Supp. 2d 449, 461 (S.D.N.Y. 2007) (failure to plead loss causation where "loss in value of the stock occurred gradually over the course of the entire class period" despite continuation of allegedly misleading statements, and complaint did "not even refer to the phenomenon of the gradual loss of the stock's value, much less attempt to explain it as related to loss causation");

IV. CONCLUSION.

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiffs' Amended Complaint with prejudice.

Respectfully submitted,

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By: */s/ Robert A. Horowitz*

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CERTIFICATE OF COMPLIANCE

Robert A. Horowitz, counsel for Helios and Matheson Analytics, Inc., Theodore Farnsworth, Stuart Benson, and Mitch Lowe, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,884 words (exclusive of the cover page, certificate of compliance, table of contents, table of authorities, and signature block) and complies with Local Civil Rule 11.1 of the Southern District of New York, as well as with Individual Practice Rule 2.D of the Honorable John G. Koeltl.

/s/ Robert A. Horowitz